No. 16571

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIE MILLER,

Plaintiff and Appellant,

vs.

ARTHUR S. FLEMMING, Secretary of Health, Education and Welfare,

Defendant and Appellee.

On Appeal From an Order of the United States District Court for the Southern District of California, Central Division, Denying Plaintiff-Appellant Old Age Insurance Benefits.

BRIEF FOR APPELLANT.

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Jurisdiction.

This Court has jurisdiction of this appeal by virtue of authority of Section 405(g), Title 42, United States Code (Section 205(g) of the Social Security Act, as amended) and by virtue of the authority of Section 1292, Title 28, United States Code, which authorizes appeals from all final orders and judgments of the United States District Court.

Statement of the Case.

This is a petition for review of an administrative order of the Appeals Council of the Department of Health, Education and Welfare, Social Security Administration, denying Appellant old age benefits under Title II of the Social Security Act.

On April 9, 1957, Appellant filed an application for old age insurance benefits with the Department of Health, Education and Welfare, Social Security Administration. A final decision of the Secretary of the Department of Health, Education and Welfare was made on October 17, 1958, denying Appellant old age insurance benefits on the ground that Appellant was an employee of the City of Los Angeles and not self-employed.

On December 16, 1958, Appellant requested review in the United States District Court of the administrative order determining that Appellant is not entitled to old age insurance benefits. On May 27, 1959, the United States District Court, Southern District of California, Central Division, made and entered its order and judgment affirming the order of Defendant-Appellee denying Appellant old age insurance benefits.

On July 8, 1959, notice of appeal was filed from the order and judgment of the United States District Court entered on May 27, 1959.

Statement of Questions Presented.

Is the question as to whether Appellant was an employee of the City of Los Angeles or self-employed one of law or fact?

Was Appellant an employee of the City of Los Angeles, or self-employed, as a matter of law?

Was Appellant an employee of the City of Los Angeles, or self-employed, as a matter of fact?

Is the decision of Defendant-Appellee supported by substantial evidence on the record considered as a whole?

The Decision of Appellee That Appellant Was an Employee Is Erroneous as a Matter of Law, and Is Not Supported by Substantial Evidence on the Record as a Whole.

Before considering the scope of this Court's review and the important factors that determine an independent contractor relationship, it is well to remind the Court that it is the policy of the Social Security Act to liberally construe the provisions of the Act in favor of those seeking its benefits. *Carroll v. Social Security Board,* 128 F. 2d 876. The purpose of the old age benefits of the Social Security Act is to provide funds for decent support of elderly people who have ceased to labor and doubts should be resolved in favor of coverage rather than exclusion. *Ewing v. McLean,* 189 F. 2d 887; *Willard v. Hobby,* 134 Fed. Supp. 66. In view of the federally declared policy in favor of coverage under the Act and against exclusion, it is the duty of the court to give a liberal construction to the provisions of the Act in favor of Appellant, who seeks its benefits.

Since the decision of the United States Supreme Court in *Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474, the Federal Courts are no longer simply a "rubber stamp" insofar as review of an administrative decision is concerned. In the *Universal Camera* case, the court noted that the phrase "substantial evidence" lent itself to the notion that it was enough that the evidence supporting an administrative decision was "substantial" when considered by itself. The court condemned such limited review and held that a reviewing court should not sustain an administrative decision based on evidence which, when viewed in isolation, substantiated the agency's findings. The Supreme Court referred to Congressional criticism

of so contracted a reviewing power in the courts and stated that protests against "shocking injustices" and "judicial abdication" stimulated pressures for legislative relief. The Supreme Court quoted legislative history wherein committee reports of both Houses of Congress referred to the practice of agencies to rely upon suspicion, surmise, implications or plainly incredible evidence and indicated that courts are to exact higher standards "in the exercise of their independent judgment and on consideration of the whole record." *Universal Camera Corp., supra,* 340 U. S. 484.

Since the decision in the *Universal Camera* case, *supra,* a reviewing court, in ascertaining whether there is "substantial evidence" to support an agency determination, must find a preponderance of the evidence in support of the agency's determination. Justice Frankfurter added that:

> "A reviewing court is not barred from setting aside a Board decision when it can not conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view."

Justice Frankfurter concluded by stating that the Administrative Procedure Act directs that courts must now assume more responsibility for the reasonableness and fairness of agency decisions than some courts have shown in the past.

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional, judicial function. Congress has imposed upon them responsibility for assuring that the Board keeps with-

> in reasonable grounds. . . . That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole."

In the light of the *Universal Camera* case, it is the duty of this Court, therefore, to consider the record as a whole in determining whether the agency's decision that Appellant was an employee is supported by the weight of the evidence. See also *Goldman v. Folsom,* 246 F. 2d 776 (reversing the Secretary's finding that a person is not entitled to benefits since the finding was not supported by the record considered as a whole); *Shields v. Folsom,* 153 Fed. Supp. 733 (The court must assume responsibility for the reasonableness and fairness of the agency decision considering the record as a whole.)

Whether an individual is an employee or an independent contractor is an issue of law and the rule that a finding of fact, if supported by substantial evidence is conclusive, is not applicable. *Carroll v. Social Security Board,* 128 F. 2d 876, 881; *Social Security Board v. Nierotko,* 327 U. S. 358, 368, 369. This is particularly true where there is a written contract of employment and the facts are not in dispute. In such a situation, the question is one of law for the court. *Albaugh v. Moss Construction Company,* 125 Cal. App. 2d 126 (Where an employment contract has been reduced to writing, the relationship of the parties must be determined therefrom and its interpretation is one of law); *Bemis v. People,* 109 Cal. App. 2d 253 (If there is no conflict in the facts, the question becomes one of law); *Perkins v. Blouth,* 163 Cal. 782 (Where there is no conflict in the evidence, the Court must decide, as a matter of law,

what the facts prove); accord *Robinson v. George,* 16 Cal. 2d 238; *Hedge v. Williams,* 131 Cal. 455; *Batt v. San Diego Sun,* 21 Cal. App. 2d 429.

An independent contractor is one "who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." California Labor Code §3353. In reviewing decisions involving an independent contractor relationship, the California Supreme Court has not hesitated to set aside a finding where it is not supported by substantial evidence. In *Mantonya v. Bratlie,* 33 Cal. 2d 120, the California Supreme Court said at 127-129:

> "There is no evidence of any substantiality which could support a finding that the firm which graded defendants' field, or the firm's employe, was an employe of defendants. Of course, where there is any real conflict in the evidence the finding of the trier of fact is conclusive. But the trier of fact is not entitled, arbitrarily or upon mere caprice, to disregard uncontradicted, entirely probable testimony of unimpeached witnesses. Adapting the language of *Perguica v. Industrial Acc. Com.* (1947), 29 Cal. 2d 857, 859 [179 P. 2d 812], to the present situation, 'Generally speaking, it is a question of fact to be determined by the [trier of fact], from the evidence adduced, whether the essential employer-employee relationship exists (*Riskin v. Industrial Acc. Com.,* 23 Cal. 2d 248, 255 [144 P. 2d 16]), and the finding on that issue will not be disturbed where it is supported by substantial evidence. (*S. A. Gerrard Co. v. Industrial Acc. Com.,* 17 Cal. 2d 411, 414 [110 P. 2d 377].) But 'if from all the facts

only a single inference and one conclusion may be drawn, whether one be an employee or an independent contractor is a question of law.' (*Baugh v. Rogers,* 24 Cal. 2d 200, 206 [148 P. 2d 633, 152 A. L. R. 1043]; *Yucaipa Farmers etc. Assn. v. Industrial Acc. Com.,* 55 Cal. App. 2d 234, 238 [130 P. 2d 146]; see also *Burlingham v. Gray,* 22 Cal. 2d 87, 100 [137 P. 2d 9].) Here any reasonable view of the evidence on the issue of [the contracting firm's] status compels the conclusion that [defendants] met their burden of proving that [the firm] was an independent contractor (Lab. Code, §5707 (a)), and that the [jury's verdict, possibly] based on a contrary finding is not sustainable. [Citations.]"

Probably the people most surprised by Appellee's decision that Appellant was an employee were the parties to the employment contract themselves, namely, Appellant and the members of the Los Angeles City Council. The determination that Appellant, *who could not be an employee of the City of Los Angeles, by city ordinance,* and who was employed under a contract drawn up by the Los Angeles City Attorney and unanimously approved by resolution of the Los Angeles City Council as an independent contractor, was an employee shocks the senses of any one familiar with the situation.

All of the *important* factors which go into a determination of the independent contractor relationship support the contention of appellant that he was an independent contractor and not an employee of the City of Los Angeles.

The most important factor is the right to control the manner and means of accomplishing the results de-

sired. In *Empire Star Mines Co. v. California Employment Commission,* 28 Cal. 2d 33, 43, it is said:

> "In determining whether one who performed services for another is an employee or an independent contractor, *the most important factor is the right to control the manner and means of accomplishing the results desired.* If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. *Strong evidence in support of an employment relationship is the right to discharge at will, without cause."* (Emphasis added.)

Accord:

> *Walder v. Industrial Accident Commission,* 85 Cal. App. 2d 473.

Appellant contends that the evidence on the record, as a whole, shows that the City of Los Angeles did not have the right to control the manner and means of accomplishing the results desired under the contract; in fact, the very nature of the contract between appellant and the City of Los Angeles was such that the City could not control the manner and means of accomplishing the result. Appellant was employed, because of his extensive experience, to investigate conditions relating to street maintenance in Los Angeles in all of its related aspects and make reports and recommendations to the Bureau of Public Works and the City Council. The nature of the work to be performed precluded the City from exercising control over the manner and means of accomplishing the result desired. *Public officials could not direct or control appellant as to the contents of his*

reports or what his recommendations should be, since the City was paying for appellant's reports and recommendations, not their own.

An analysis of the record will show that the Secretary's decision has no factual or legal support. An ordinance of the City of Los Angeles provided that all city employees must be retired at 70 and that no person who is retired shall thereafter be paid for any services rendered as an employee of the City. It was impossible, therefore, for appellant to be employed as an employee of the City. Having a need for appellant's extensive skills and experience, the City Council created the position of consultant, and entered into a contract with appellant as an independent contractor. Appellant's duties were to investigate conditions with regard to street maintenance and its related aspects and make reports and recommendations to high city officials. Under the contract, Appellant's compensation was not dependent on the amount and kind of work done. Appellant was not carried on the city payroll, as are all employees of the City; he was paid under the contract once every four months rather than twice a month as are city employees; the money to pay appellant was taken from a special appropriation by the City Council. The Secretary ignores the City Ordinance on the authority of *Matcovich v. Anglim,* 134 F. 2d 834. We submit that this decision of the Ninth Circuit Court has been modified somewhat by the decision of the Ninth Circuit Court in *Folsom v. Pearsall,* 245 F. 2d 562, where the Secretary was reversed when he failed to follow California law. We believe also that the *Matcovich* decision is not controlling for the further reason that in the instant case a written contract of employment was entered into between ap-

pellant and the City of Los Angeles which was intended to, and did, comply with the city ordinance, forbidding the employment of appellant as an employee of the City. There is in this case more than simply a State law or State decision, as was the situation in the *Matcovich* case. We have a resolution of the Los Angeles City Council employing appellant as an independent contractor [R. T. 87]. The City Council authorized the Bureau of City Works to enter into a contract with appellant as an independent contractor [R. T. 87]. The contract of employment established an independent contractor relationship. In this situation, the Secretary is not free to ignore the resolution of the City Council approved by the Mayor and the contract of employment between the City and appellant approved by the City Attorney on the ground that the proceedings were a sham and subterfuge designed to evade and circumvent the City Ordinance. (See Appellee's Brief filed in the District Court, pages 26, 28). To the contrary, it must be presumed that the Mayor of Los Angeles, the City Council and the City Attorney followed the law and did not engage appellant as an employee, since they could not legally do so.

We pause at this point to ask the Court to consider this question on the record before it: Would the City of Los Angeles be liable to third persons under the doctrine of *respondeat superior* for the negligence of appellant in carrying out the terms of his contract? The City would be liable to third persons if appellant was an employee but not liable if appellant was an independent contractor. It is inconceivable that anyone could successfully hold the City liable for the acts of appellant in performing under the contract.

Appellant contends that the following evidence clearly supports a determination that he was a self-employed independent contractor:

1. A city ordinance forbade the City Council from employing appellant as an employee.

2. Having need for appellant's extensive skills and experience, the City Council, by resolution, approved by the Mayor, created the position of consultant.

3. The City Council entered into a contract with appellant, approved by the City Attorney, as an independent contractor.

4. In the contract appellant is designated as an independent conractor.

5. The parties believed that they were creating an independent contractor relationship.

6. Appellant's duties were to investigate conditions with regard to street maintenance and its related aspects and make reports and recommendations to high city officials—a type of employment which did not permit the City to control the manner or means of accomplishing the results contracted for.

7. The contract and testimony show that the City could not, and did not, control the means of accomplishing the results. (The Referee's decision admits that appellant was not supervised in the performance of his work and that this working time was not regulated.)

8. Appellant relinquished all of his former duties as Director of the Bureau of Street Maintenance [R. T. 25].

9. His contract required him to do work which he had not done before, that is, to consult and make recom-

mendations directly to the City Council and officials at City Hall [R. T. 26].

10. His offices were removed from the Bureau of Street Maintenance to the offices of the Bureau of Public Works [R. T. 25].

11. Appellant gave up all of his supervisory duties in connection with the Bureau of Street Maintenance [R. T. 23, 26].

12. No one had ever been employed by the City Council as an *employee* of the City to perform the work called for under appellant's contract [R. T. 27].

13. Appellant was free to work for others, if he desired [R. T. 29].

14. Investigations, reports and recommendations to the Bureau of Public Works and City Council was not work done by the Bureau of Street Maintenance prior to appellant's retirement; this type of work was handled through the Bureau of Construction [R. T. 30].

15. Appellant worked with the Bureau of Public Works as an independent consultant and was left to his onw discretion as to what he did and hours worked [R. T. 30-31].

16. He was furnished no regular secretary and no private office by the City [R. T. 31-32].

17. Upon the termination of the contract, the City Council wanted to enter into a new contract for his services as consultant but appellant preferred to retire [R. T. 32-33].

18. Appellant's compensation was not dependent on the amount or kind of work which was done; he was paid a specified sum for a specified result [R. T. 33].

19. He furnished his own automobile and insured the City gainst liability caused by acts of appellant in performing the contract [R. T. 33 and Contract of Employment].

20. All reports and memorandums were signed as consultant [R. T. 34].

21. Appellant had no one that he reported to as his boss [R. T. 36].

22. He was not on the city payroll as are all employees of the City [R. T. 36].

23. Appellant was paid every four months rather than twice a month as city employees are paid [R. T. 36].

24. Money for his compensation and automobile expense came from a special appropriation of the City Council [R. T. 37].

25. Appellant's tax returns reported the income as self-employment income as consultant to the City of Los Angeles [R. T. 40].

26. No withholding tax was paid on compensation received by appellant [R. T. 40].

27. A review of the list of activities performed by appellant under the contract as set out at Reporter's Transcript, page 68, *et seq.* of the transcript shows that the work is the type that a consultant and independent contractor would perform.

28. The employment relationship questionnaire, prepared by the City of Los Angeles, at Reporter's Transcript, pages 88 through 91, showed the understanding of the City as to the relationship established between appellant and the City as follows:

(a) Appellant was permitted to work for others [R. T. 88];

(b) He held himself out to the public as available as a consultant [R. T. 89];

(c) He was engaged for particular jobs [R. T. 89];

(d) He had no fixed hours [R. T. 89];

(e) He was not required to follow a daily or weekly routine or schedule [R. T. 89];

(f) *Appellant was not given instructions about the way the work was to be done* [R. T. 89];

(g) *The City could not change the methods used by appellant in doing the work or otherwise direct him as to how to do the work* [R. T. 89];

(h) Appellant was not required to produce a certain amount of work regularly if his services with the City were to continue [R. T. 89-90];

(i) Appellant was paid by contract and not on a salary or hourly wage basis [R. T. 90];

(j) Appellant was not eligible for bonus, sick pay, vacations, etc., like other employees of the City [R. T. 990];

(k) No workmen's compensation insurance was carried by City on appellant [R. T. 90];

(l) *The City could not discharge appellant, and appellant could not quit until the contract was performed* [R. T. 90];

(m) *Appellant worked as an independent contractor and not as an employee* [R. T. 90];

(n) Appellant's earnings were reported as self-employment income [R. T. 90];

(o) Social Security Taxes were not deducted from the amounts paid appellant [R. T. 90];

(p) Appellant only worked part time [R. T. 91];

(q) The contract terms were never changed [R. T. 91];

29. Appellant's answers to the employment relationship questionnaire, found at Reporter's Transcript pages 92 through 95, contain virtually the same answers as the answers filed by the City to appellee's questionnaire; appellant adds that liability would have been incurred if the contract was broken [R. T. 94] and that his services rendered under the contract were completely different from the services rendered previously [R. T. 94].

A recitation of the foregoing evidence would seem to show that the finding of the appellee is against the weight and preponderance of the evidence. Appellee justifies the decision under the doctrine of "conflict of evidence," but this doctrine can be maintained only where the alleged conflict rests upon evidence which so materially contradicts the testimony on the other side or is so inconsistent with it as to leave room in a fair and reasonable mind to find the fact either way.

Appellee completely ignored the most important single fact in the case, namely, the written contract of employment. Counsel for appellee acknowledges this when he said at page 28 of his brief filed in the District Court that "it means little that a written contract had been executed." The contract of employment and the entire relationship between appellant and the City of Los Angeles, as expressed in the resolution of the City Council, authorizing the employment of appellant, as an independent contractor, is disregarded by appellee on the ground that it is a "subterfuge" (appellee's brief p. 15), "concealment" (appellee's brief p. 16), a "cover up" agreement (appellee's brief p. 16), "concealment of the true relationship is the controlling factor" (appellee's

brief p. 26), it was a "family arrangement" (appellee's brief p. 28), and a "circumvention" of the ordinance by the City (appellee's brief p. 28). This inference and conclusion goes to the heart of the case and is wholly unwarranted by the record and is not binding on this Court. To the contrary, the presumption is that the city officials were following the law and carrying out their official duties.

The appellee goes to great lengths to show that appellant was performing similar work to that performed by him as an employee of the City, and, therefore, he must still be an employee of the City, notwithstanding the contract of employment and the ordinance. Of course, the fact that appellant had previously been in the employ of the City doing the same type of work does not change the relationship from that of independent contractor to employee. (See *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, 577), where the Court said, in reversing a finding of employee relationship:

> "Another circumstance relied on is that Wyman was formerly in the employ of appellant as its foreman and as such foreman did work for appellant on other roads; but surely that fact could in no way effect the *contractual relations* between said parties as to the building of the road in question."

Conclusion.

The Secretary has discredited and/or ignored the most important evidence in this case going to the heart of the relationship between Appellant and the City of Los Angeles, namely, the contract of employment and the City ordinance. Where there is a state statute, a written contract of employment, no dispute as to the facts, and the

question involves construction of a statutory definition of "employee" under the Act, the question is one of law for the Court. As a matter of law, this Court should find that Appellant was not an employee of the City of Los Angeles. Assuming, however, that the issue is a mixed question of law and fact, Appellee's decision is not supported by substantial evidence on the record considered as a whole.

Respectfully submitted,

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